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No. 256

IN THE

Supreme Court of the United States

ADELHEIT VON HARDENBERG and IRMGARD VON ALTEN,
Petitioners,

vs.

NICHOLAS DeB. KATZENBACH, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

THOMAS P. SULLIVAN
HUGH M. KING
135 S. LaSalle Street
Chicago, Illinois 60603
Attorneys for Petitioners

Of Counsel:
RAYMOND, MAYER, JENNER & BLOCK
135 S. LaSalle St.
Chicago, Illinois 60603

ROLAND TOWLE
111 W. Washington
Chicago, Illinois

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST DISTRICT

Adelheit von Hardenberg and Irmgard von Alten pray that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First District, entered in the above-entitled case on December 9, 1965.

Citation to Opinion Below

The Circuit Court of Cook County, Illinois denied petitioners' motion for summary judgment, without opinion. The opinion of the Appellate Court of Illinois, First District, printed in Appendix A hereto, is reported in 65 Ill. App. 2d 253, 212 N.E. 2d 694.

Jurisdiction.

On December 9, 1965, the Illinois Appellate Court, First District, Third Division, filed its opinion affirming the denial of defendants' motion for summary judgment. On March 22, 1966, the Illinois Supreme Court denied petitioners' petition for leave to appeal. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

Questions Presented

1. Was the interest of petitioners in the Bigelow Trust "vested in possession in the Attorney General prior to December 31, 1961" so as to avoid the divestiture provisions of the 1962 amendment to the Trading With the Enemy Act?

2. Did the pendency on December 31, 1961 of litigation involving substantial claims as competing claims to ownership of a one-third interest in the Bigelow Trust prevent that interest from being "vested in possession in the Attorney General"?

Statute Involved

Public Law 87-846, passed by the United States Congress in 1962 is the crux of this case. This law added section 40(a) to The Trading With The Enemy Act (50 U.S.C. App. § 41) which provides in pertinent part:

> "Subject to the provisions of subsection (b) hereof, all rights and interests of individuals in estates, trusts, insurance policies, annuities, remainders, pensions, workmen's compensation and veterans' benefits vested under this Act after December 17, 1941, which have not become payable or deliverable to or have not vested in possession in the Attorney General prior to December 31, 1961, are hereby divested; *provided,* that the provisions of this section shall not affect the right of the Attorney General to retain all such property rights and interests and to collect all income which is payable to or vested in possession in him prior to December 31, 1961."

STATEMENT OF THE CASE

How This Case Presents A Federal Question

The jurisdiction of this Court is invoked by a writ of certiorari due to petitioners' assertion of rights and title to certain property under the Statutes of the United States.

The Trust Established By Petitioners' Great-Grandmother—1873

Louisa Bigelow (petitioners' great-grandmother) by her will established a trust for her three granddaughters—Josephine Caldwell, Sarah DeHaven and Louise DeHaven (petitioners' mother). The corpus of the trust consisted of certain real estate located in the heart of downtown Chicago as well as other assets. Louisa Bigelow died in 1873. (A. 1, 28-33.)

Petitioners are citizens and residents of Germany. Petitioners' mother, Louise DeHaven, was a native and citizen of the United States who resided in this country from the end of World War I until her death in 1941.

The will of petitioners' great-grandmother provides that the income from the trust is to be paid to petitioners' mother and two aunts during their lifetimes and upon the death of the last of them, one-third of the corpus of the trust is to go to the children or heirs of each of Louisa Bigelow's grand-daughters. (A. 30-31.)

Petitioners' mother, Louise DeHaven, died in 1941. Petitioners' aunts, Josephine Caldwell and Sarah DeHaven, died in 1919 and 1951 respectively. (A. 44-45.)

The Orme Case — 1943

In 1943, two years after the death of petitioners' mother, an action was brought by Eugene Orme to construe her will. Orme claimed that he (and not petitioners) was entitled to one-third of the trust created by petitioners' great-grandmother. Petitioners and the other descendants of Louisa Bigelow were made defendants in this action by Orme. (A. 147.)

In 1944, one of these defendants, Raymond DeHaven, filed a counterclaim in the *Orme* litigation in which he claimed that he was entitled to one-third of that portion of the Bigelow trust payable to Louise deHaven's heirs. (A. 147.)

The *Orme* litigation dragged along through the years. Not until December 10, 1962 were all of the issues involved in the case finally determined.

The Attorney General's Vesting of Petitioners' Remainder Interest In Their Great-Grandmother's Trust —1949.

On March 29 and April 27, 1949, by virtue of the authority granted him under § 8(c) of the Trading With The Enemy Act (50 U.S.C. App. § 7), the Attorney General of the United States issued orders (14 Fed. Reg. 1660 and 2227) "vesting" in himself the interests which petitioners claimed in the trust created by their great-grandmother. (A. 82-83.)

On May 23, 1949, the Attorney General of the United States petitioned the court in the *Orme* litigation requesting, on the basis of his prior vesting orders, that he be substituted in lieu of petitioners as a defendant in that litigation. Petitioners resisted the Attorney General's attempt to take their place in the *Orme* case, arguing that the Attorney General had no authority to seize their interests under the Trading With The Enemy Act because the war with Germany had long since ceased. (A. 147.)

On November 9, 1950, the trial judge entered an order permitting the Attorney General to replace the petitioners as defendants in the *Orme* case. Petitioners appealed this order to the Supreme Court of Illinois and on November 27, 1951, the Supreme Court of Illinois affirmed the order holding (*inter alia*) that a technical state of war still existed with Germany because no peace treaty had been signed and that therefore the Attorney General was still empowered to exercise the seizure power vested in him over the property belonging to those who were still technically the enemies of this country. (410 Ill. 354, 102 N.E. 2d 335.) Thereafter, on April 7, 1952, this Court denied petitioners' petition for writ of certiorari, (342 U.S. 921.) (A. 148.)

The Final Decree of the Trial Court In the Orme Case — 1959

Eventually, the *Orme* case was referred for a hearing to a Master in Chancery. In 1957, the Master filed his report on the merits of the controversy and in 1958 his report as to attorneys' fees was filed. On March 2, 1959, the Chancellor entered a final decree. This decree rejected both Eugene Orme's claim to all of petitioners' share of their great-grandmother's trust and Raymond DeHaven's claim to one-third thereof. The decree further construed Louisa Bigelow's will to mean that each of her three granddaughters (petitioners' mother and two aunts) received a life estate in trust and that upon the death of the last of the three granddaughters (1951), the children of each of the granddaughters (including petitioners) were entitled to receive and divide one-third of the trust assets *per stirpes*. (A. 135-139, 163-164.)

The Chancellor further decreed that the Attorney General of the United States, by virtue of his prior vesting orders, was to receive petitioners' interest in the trust. (A. 136-137.)

The trustee was prohibited, however, from making any distribution of the trust assets or accumulated income, ". . . pending the entry of a final decree in this cause [the *Orme* case] and shall make distribution upon the entry of and in accordance with a final decree or decrees in the *Biddle* suit [the case here at bar] in the amounts as shall be finally determined in and by such decree or decrees and upon determination of the validity, amount and rank of liens, if any, which have been asserted and remain unsatisfied against said interests in said *Biddle* suit, as shall be finally determined in and by such decree or decrees therein, and upon approval of the trustee's final account therein." (A. 135-139, 163-164.)

The Appeals In The Orme Case — 1959-1962.

Following the entry of the trial court's decree in the *Orme* case, Eugene Orme, petitioners, Raymond deHaven, and others perfected appeals to the Appellate Court of Illinois asking that the trial court's decree be modified or reversed. Petitioners argued on appeal that although the Attorney General's seizure order may have been valid due to the technical state of war existing with Germany, their interest in their great-grandmother's trust was not within the scope of his (the Attorney General's) vesting order. The Appellate Court of Illinois affirmed the decision of the Circuit Court on January 9, 1961 (29 Ill. App. 2d 75, 172 N.E.2d 413.) The Illinois Supreme Court granted leave to appeal. Thereafter, on May 25, 1962, the Supreme Court affirmed. (25 Ill. 2d 151, 183 N.E.2d 505.) (A. 149-150.)

On July 13, 1962, the Supreme Court of Illinois entered an order staying its mandate in the *Orme* case insofar as

it directed the distribution of one third of petitioners' great-grandmother's trust to the Attorney General of the United States, until final disposition of petitioners' petition for a writ of certiorari. The trial court thereafter entered a similar order prohibiting distribution. (A. 150-151.)

This Court denied petitioners' petition for a writ of certiorari on December 10, 1962. (371 U.S. 935 (1962)).

The Trustee's Suit For Instructions — 1950-1966.

The case at bar was brought in 1951 by the Northern Trust Company, as trustee of the Bigelow Trust. In this suit the trustee sought interpretation of the Bigelow will, instructions as to the administration of the trust, and permission to sell certain trust assets. (A. 1-28.) (This suit was entitled below as *Northern Trust Co.* v. *Biddle, et al.*)

Petitioners were made defendants and filed an answer to the complaint. No attempt has ever been made to remove or replace petitioners as parties defendant in this case. (A. 43-54.)

Later in the year 1951, the trustee filed a supplemental complaint which alleged (*inter alia*) (A. 49):

> "38. The doubts, uncertainties and problems which are presented as to distribution of the assets of the Bigelow Trust should be resolved and determined in this proceeding, insofar as the same are not determinable in the *Orme* Suit, and the time for the distribution of the Bigelow Trust having now arrived, distribution should be made as expeditiously as possible *after the parties entitled thereto are finally determined and the interests of the several beneficiaries should be conserved in the interim.*" (Emphasis added.)

As parties defendant, petitioners answered this supplemental complaint. (A. 55.)

The Attorney General of the United States also answered this supplemental complaint complaining that by reason of his seizure orders in the *Orme* litigation, petitioners' share of their great-grandmother's trust should be distributed to him. By way of a counterclaim, the Attorney General of the United States also sought (*inter alia*) a decree finding that petitioners' mother's share of the Bigelow Trust vested in petitioners upon the death of their mother in 1941 and that the Attorney General had succeeded to petitioner's rights in that property. (A. 59, 63-81.)

Raymond DeHaven, also a defendant, asserted by way of counterclaim his claim to one-third of petitioners' share of the trust. (A. 89-90.)

The *Biddle* case made little progress through the years, chiefly because the parties were awaiting the outcome of the *Orme* litigation.

In July 1962, after the Supreme Court of Illinois had affirmed the trial court's decree in the *Orme* case, but before petitioners' petition for a writ of certiorari was ruled upon by this Court in that case, the trustee filed a second supplemental complaint in the *Biddle* case in which the chronology of events was brought up to date for the court and permission was sought to distribute the shares of petitioners' great-grandmother's trust which had been willed to the children and heirs of petitioners' aunts Josephine Caldwell and Sarah DeHaven. In this second supplemental complaint, the trustee pointed out that to that date no distribution could yet be made of petitioners' mother's share of the Bigelow Trust because the pendency of petitioners' petition for a writ of certiorari before this Court in the *Orme* litigation. (A. 132, par. 8.)

In August of 1962, the Attorney General of the United States filed an answer to this second supplemental complaint, in which he requested (*inter alia*) (A. 144):

> "(c) That this Court determine the quantum of interest in the said trust estate distributable under the terms of the Bigelow will to the children of Louise DeHaven [petitioners' mother] and direct the trustee to make distribution of such share to the persons determined to be entitled thereto upon final determination of the litigation with respect to such share [*viz.*, the *Orme* litigation]."

The Passage of Public Law 87-846, and Defendants' Motion For Summary Judgment.

On May 1, 1963, petitioners filed a motion for summary judgment in the case at bar (the *Biddle* case). The motion is based upon that part of Public Law 87-846, which took effect on October 22, 1962, and which amends Section 40 of The Trading With The Enemy Act and dictates the return of certain previously "vested" interests to their rightful alien owners. (A. 146-152.)

The 1962 amendment is set forth in full at page 2 above. It provides that previously vested interests are divested, if the interests "have not become payable or deliverable to or have not vested in possession in the Attorney General prior to December 31, 1961 . . ."

It is this law which petitioners contend dictates the return of their previously seized property. The correct interpretation of this amendment, an act of legislative amnesty, is the single but important question raised by petitioners for review by this Court.

The Circuit Court of Cook County, Illinois denied defendants' motion for summary judgment. (A. 152.) In the final decree entered by the trial court, the trustee was directed to distribute petitioners' share of the Bigelow Trust ("Distribution Fund B", approximately $725,000) to the Attorney General of the United States. (A. 170-171.)

Petitioners thereafter prosecuted an appeal from this final decree as to (*inter alia*) the denial of their motion for summary judgment. (A. 174.) On December 9, 1965, the Illinois Appellate Court, First District, Third Division, filed its opinion (Appendix A to this Petition) affirming (*inter alia*) the denial of defendants' motion for summary judgment (Appendix B to this Petition).

On February 2, 1966, petitioners filed their petition for leave to appeal to the Supreme Court of Illinois. On March 22, 1966, the Supreme Court of Illinois denied the petition.

Thereafter, on March 28, 1966, petitioners filed in the Appellate Court of Illinois their motion for a stay of that court's mandate until June 20, 1966 pending their preparation and filing of this petition for a writ of certiorari, which motion was granted on March 31, 1966.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

THE APPELLATE COURT OF ILLINOIS HAS DECIDED A NOVEL AND IMPORTANT FEDERAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT OR ANY OTHER FEDERAL COURT.

On October 22, 1962, the President of the United States signed Public Law 87-846—an amendment to The Trading With The Enemy Act—into law. The amendment originated in the Senate and after a conference was passed by both houses. (108 Cong. Rec. 19227-19228, 21900.) The debates on the amendment in the Senate of the United States clearly demonstrate the congressional conclusion that continuation of the United States' program of seizing and holding property situated in this country belonging to former enemy aliens would be wasteful of administrative resources and inconsistent with our current foreign policy, aid programs and valued alliances. (108 Cong. Rec. 19196-19197, 22249.)

Neither this Court nor any other Federal Court has ever had occasion to construe this particular amendment. Indeed, the case at bar is only the second reported case in the country which deals with Public Law 87-846. The other case is *Estate of Hogemann*, 45 Cal. Rep. 149, 403 P. 2d 405 (1965), reversing 41 Cal. Rep. 246 (D.C. App. 1964).

The diametrically opposed opinions of the intermediate and Supreme Courts of California in the *Hogemann* case, as well as the split of opinion among the justices of the

California Supreme Court, illustrate the unique and difficult nature of the legal questions involved.

The ultimate question is, of course, the intent of Congress in using the words "vested in possession in" in the 1962 amendment to The Trading With The Enemy Act.

The Appellate Court of Illinois has taken the position that Congress intended to continue the wartime program of expropriation of property interests situated as petitioners' interests were on December 31, 1961. Petitioners, on the other hand, contend that Congress intended to return their property to them.

This issue is of widespread significance. Involved here are the relations between the United States and several of its closest allies. We submit that the interpretation of this remedial amendment to the confiscatory Trading With The Enemy Act is deserving of the attention of this Court.

II.

THE HOLDING OF THE APPELLATE COURT OF ILLINOIS THAT THE LOUISE deHAVEN SHARE HAD "VESTED IN POSSESSION IN" THE ATTORNEY GENERAL PRIOR TO DECEMBER 31, 1961 IS IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

Petitioners contend that the pendency of the *Orme* case and the instant litigation prevented their share of their great-grandmother's trust from becoming "vested in possession in" the Attorney General of the United States on the statutory cut-off date, December 31, 1961.

The Appellate Court of Illinois rejected this contention, apparently adopting the position of the Attorney General that (Atty. Gen.'s Br. p. 14):

". . . the purpose of the statute was to divest interests as to which it was not possible, at the cut-off date, *to engage in litigation directed toward reduction to possession.*" (Emphasis added.)

We submit this construction of the recent amendment is erroneous, and defeats the chief purpose of the amendment.

A.

The Status of the Louise deHaven Share of the Bigelow Trust On December 31, 1961.

On December 31, 1961, the cut-off date specified in the amendment to The Trading With The Enemy Act, the following factors precluded the Attorney General from collecting the Louise deHaven Share of the Bigelow Trust:

(1) Eugene Orme claimed that he was entitled to the entire Louise de Haven Share. This claim had not been finally adjudicated, the *Orme* case was then pending and awaiting oral argument in the Supreme Court of Illinois.

(2) Raymond de Haven's claim to one-third of the Louise de Haven Share was likewise undetermined, and awaiting decision in the *Orme* case.

(3) The effect of the Attorney General's order "vesting" the Louise de Haven Share was also undetermined. Petitioners contended in the Illinois Supreme Court that the vesting order did not include their remainder interest in their great-grandmother's trust.

(4) The trustee still had possession of the Louise de Haven Share of the Bigelow Trust and there was no court order directing the trustee to make any distribution to the Attorney General. In fact, the *Orme*

decree (then on appeal) specifically postponed distribution until entry of an appropriate decree in the case at bar, which had not yet been entered.

Moreover, on June 20, 1962 and July 13, 1962—six months after the cut-off date—orders were entered in the *Orme* case by the trial and Illinois Supreme courts specifically prohibiting distribution of petitioners' share of the trust until all avenues of appeal had been exhausted.

B.

Petitioners' Share of Their Great-Grandmother's Trust Was Not "Vested In Possession In" the Attorney General As of December 31, 1961.

It is undisputed that the words "vested in possession" as used in this amendment, mean "a right of present enjoyment." In fact, the Appellate Court of Illinois expressly adopted this definition. (App. A, p. 6.)

The amendment requires that the interest in question be vested in possession *in the Attorney General of the United States;* that is, as of December 31, 1961, *the Attorney General* must have had a fixed right of present enjoyment.

It is clear that due to the pendency of the *Orme* litigation, neither the Attorney General, nor petitioners, nor for that matter Eugene Orme or Raymond de Haven, had a right to present enjoyment of the interests in question on December 31, 1961.

It is significant that the Attorney General never sought to obtain possession of that share prior to the cut-off date. He could not have done so, by reason of the uncertainties presented by the competing claims in the *Orme* litigation

and the express provisions of the court orders prohibiting distribution of that share to the Attorney General or to anyone else.

All of the parties to both the *Orme* suit and the instant litigation were aware that until the final adjudication of the rights of the competing parties to the *Orme* case, it would be unclear as to precisely who was entitled to the assets in question.

The Appellate Court of Illinois, however, took the position in its opinion that the final judicial determination of rights by the Illinois Supreme Court in 1962 and the action of this Court in denying petitioners' petition for a writ of certiorari, relate back to the time when, under the will of petitioners' great-grandmother, the corpus of the trust was made distributable—in 1951 (App. A, pp. 9 to 10):

> "... The construction of the instrument creating the right may require the aid of a court, and litigation may postpone the actual custody or enjoyment of the right and *may be necessary to determine the identity of the holder of the right,* but the right of present enjoyment is fixed when the precedent estate determines." (Emphasis added)

This reasoning is erroneous. The amendment to The Trading With The Enemy Act specifically requires that the interest be vested in the possession *in the Attorney General of the United States,* not merely that it be a present right in an abstract legal sense. This requirement was not met until the final judicial determination of the competing claims in the *Orme* litigation. Under the rule of *United States* v. *The Schooner Peggy,* 1 U.S. 256 (1802), that final judicial determination in 1962 cannot be said to relate back, insofar as the divesture amendment to The Trading With The Enemy Act is concerned, to the date on which the last life tenant of the trust died.

In the *Peggy* ease, a French ship had been seized pursuant to war-time regulations. A lower court ordered that the ship be condemned, and the owners appealed to this Court. While the appeal was pending, the United States signed a treaty with France providing (*inter alia*) for restoration of ships not "definitively condemned" prior to the effective date of the treaty. In holding for the appellant, this Court stated (1 U.S. at 257, 258):

> "The terms used in the treaty seem to apply to the *actual condition of the property, and to direct a restoration of that which is still in controversy between the parties.* . . . In this case the sentence of condemnation was appealed from. It might have been reversed, and therefore was not such a sentence as in the contemplation of the contracting parties, on a fair and honest construction of the contract, was designated as a definitive condemnation.
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> "It is in general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. *But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.*" (Emphasis added.)

Similarly, in the case at bar, the amendment to The Trading With The Enemy Act applies to the "actual condition" of the interest in question as of the cut-off date. In the case at bar, as in the *Peggy* case, the property in question was still involved in controversy between the parties and the case was pending on appeal when the amendment became effective. Subsequent to the judgment of the trial court, but before the decision of the Illinois Supreme Court, a law intervened and positively changed the rule which governs. This law, it is submitted, should be obeyed.

At issue here is the effect of an act of legislative grace which cuts across pending controversies at a certain point in time, divesting the Attorney General of all interests to which he did not have a *fixed right* of present enjoyment at that point in time.

If the Appellate Court's ruling is left undisturbed, the recent amendment to the Trading With The Enemy Act will to a large extent be nullified. That amendment, on its face, contemplates something more than the issuance of a "vesting order" for the Attorney General to avoid divesture; otherwise the amendment would be meaningless. That something more is the establishment in the Attorney General, on or before December 31, 1961, of an *uncontested* right to present enjoyment of the interests or property which he had previously vested.

C.

The Decision of the Illinois Appellate Court Conflicts With Several Decisions of This Court Construing a Similar Post-War Statute.

In 1898, the Congress of the United States enacted a statute which taxed certain estates in order to provide revenue for the Spanish-American War. When the war ended, the taxing provisions were repealed. This repealer section is similar in many respects to the amendment to The Trading With The Enemy Act involved in the case at bar. Section 3 of the repealing act (32 Stat. 406) provided that the Secretary of the Treasury was to refund to applicants who had paid taxes under the repealed statute:

> "...so much of said tax as may have been collected on contingent beneficial interests *which shall not have become vested prior to July 1, 1902.* And no tax shall hereafter be assessed or imposed under said act . . .

upon or in respect of any contingent beneficial interest *which shall not become absolutely vested in possession or enjoyment prior to said July first*, nineteen hundred and two." (Emphasis added.)

Subsequent to the passage of this Act, this Court held that the cut-off for refunds must be equivalent to the cut-off for collection, and therefore any tax collected on an interest which had not "absolutely vested in possession or enjoyment" before the cut-off date would be refunded. *Vanderbilt* v. *Eidman*, 196 U.S. 480, 500 (1905); *United States* v. *Fidelity Trust Co.*, 222 U.S. 158, 159 (1911); *United States* v. *Jones*, 236 U.S. 106, 110-111 (1915).

Here, a strikingly similar situation is presented—a refund of money collected during war-time where the affected property or interest had not become vested in possession as of a particular cut off date. The decisions of this Court discussed below concerned suits brought by the persons having paid the tax who claimed the right to a refund on the ground that their interests, upon which the tax had been collected, were not "absolutely vested in possession or enjoyment" prior to the statutory cut-off date. The similarity to the issues involved in petitioners' motion for summary judgment in this case is clear.

In *United States* v. *Jones*, 236 U.S. 106 (1915), the interest in question passed to the administrator before the cut-off date, but according to the law of Pennsylvania the administrator could not be compelled to make distribution for one full year thereafter, and he did not make a distribution for several months. Thus, the interests were clearly "vested" in the legatees, but were not distributed to them until after the cut-off date. This Court held that these interests were non-taxable because they did not become absolutely vested in possession or enjoyment "until the

daughters were entitled to receive their respective shares in the property remaining after the debts and expenses were paid, which was not until several months after July 1, 1902 [the cut-off date]." (236 U.S. at 111.) This Court said (236 U.S. at 112-114):

> "True, by that Act, the executor or administrator was required, before surrendering a legacy or distributive share to whoever was entitled to it, to pay the tax assessed thereon and to deduct the amount from the particular legacy or distributive share, but this did not mean that the tax was to be assessed or paid in the absence of a right to immediate possession or enjoyment. On the contrary, as was held in *Vanderbilt* v. *Eidman*, [196 U.S. 480], p. 499, *it imported the existence of 'a practically contemporaneous right to receive the legacy or distributive share.'* In that case it was said, after separately considering the several parts of the act (p. 495): '*In view of the express provisions of the statute as to possession or enjoyment and beneficial interest and clear value, and of the absence of any express language exhibiting an intention to tax a mere technically vested interest in a case where the right to possession or enjoyment was subordinated to an uncertain contingency,* it would, we think, be doing violence to the statute to construe it as taxing such an interest before the period when possession or enjoyment had attached.'
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> "Applying this statute to the facts before stated, we see no escape from the conclusion that the tax in question must be refunded. It was collected upon distributive shares which neither were nor could have been absolutely vested in possession or enjoyment prior to July 1, 1902. The intestate's death had occurred only three days before, no administrator had been appointed, *the debts and expenses had not been ascertained, what, if anything, would remain after their pay-*

ment was uncertain, and the time had not come when the daughters were entitled to a distribution." (Emphasis added.)

The italicized considerations in the last quoted paragraph were true to the Louise de Haven Share of the Bigelow Trust on December 31, 1961.

McCoach v. *Pratt,* 236 U.S. 562 (1915), was a case identical to *United States* v. *Jones,* except that the tax was collected on the legacies. The tax was likewise refunded.

In *Uterhart* v. *United States,* 240 U.S. 598 (1916), the will in question provided that the "executors and executrix and trustees shall not be compelled to make distribution of the principal of the estate or any part thereof, except in the exercise of their reasonable discretion, until the said Carl Stein attains the age of twenty-one years." (240 U.S. at 604.) This Court held that the tax collected on the principal must be refunded, since Carl Stein would reach twenty-one after the cut-off date and the interests would not be "absolutely vested in possession or enjoyment" until that time. (240 U.S. at 605)

By way of contrast, in the case at bar, the trustee was *prohibited* from distributing petitioners' share of their great-grandmother's trust until almost a year after the cut-off date of December 31, 1961, because of the pendency of the *Orme* litigation.

If, as this Court has held in the above cited cases, an interest in an estate is not "vested in possession" because the estate is still in the process of administration (the *Jones* and *McCoach* cases), or because the trustee has not exercised his discretion to make distribution (the *Uterhart* case), it follows *a fortiori* that an interest is not vested in possession where serious questions are presented in pending litigation as to who of several competing claimants is entitled to receive the interest.

It is instructive to compare the holdings of this Court in cases arising under the repealer of the Spanish-American War taxing statute wherein this Court held that the interests in question *had* vested in possession of the claimants and were therefore taxable.

In *Kahn* v. *United States,* 257 U.S. 244 (1921), the only reason advanced to defeat imposition of the tax was that the executor had failed to set up a trust fund as directed by the testator. This Court held (257 U.S. at 245):

> ". . . the mere failure of executors to establish the trust fund will not prevent vesting of this legacy, if under state law the time for payment has come, *the right thereto is uncontroverted,* and it is clear that the money retained will not be needed to satisfy an outstanding claims." (Emphasis added.)

In the *Kahn* case, this Court pointed out that as of the cut-off date ". . . *no pending controversy or outstanding claim could affect the value of any but the residuiary legacies; and these only to a slight extent.*" (257 U.S.at 246.) (Emphasis added.)

The contrast to the case at bar and to the decisions of this Court where refunds were ordered is clear. In this case, a "pending controversy" was in progress on the cut-off date in which two parties (Eugene Orme and petitioners) claimed the entire interest seized by the Attorney General, and another party (Raymond de Haven) claimed one-third of that interest. The Attorney General's right to immediate distribution of the assets, far from being "uncontroverted", was seriously challenged by three separate claimants.

In *Simpson* v. *United States,* 252 U.S. 547 (1920), this Court refused a refund based upon a finding that the interests in question were "absolutely vested in possession

or enjoyment" because at the time of the cut-off date, no "genuine obstacle" existed as to the heirs' present right to possession or enjoyment (252 U.S. at 552):

> "It is thus apparent that for many months prior to July 1, 1902, there were abundant assets with which to make payments upon the two legacies, in an amount larger than was necessary to make them equal to, and greater than, that for which they were assessed for taxation; *that for many months before that date it was the legal duty of the executors to make such payments, and that for a lifetime the legatees had a statutory right to institute suit to compel payment.*" (Emphasis added.)

In the case at bar, it was the legal duty of the custodian of the assets of the trust *not* to make payments or distribution thereof pursuant to the order of the trial and Supreme Courts of Illinois in the *Orme* case. Furthermore, none of the parties contending for the Louise de Haven Share of the trust—including the Attorney General—had a right (statutory or otherwise) to compel payment on December 31, 1961, and no such effort was ever made.

The holding of the Supreme Court of California is the only other case construing the 1962 amendment to The Trading With the Enemy Act, *Estate of Hogemann,* 45 Cal. Rep. 149, 403 P. 2d 405 (1965), is similar to the above cases decided by this Court wherein the tax refunds were denied.

In *Hogemann,* the appellants relied solely upon the absence, prior to the statutory cut-off date, of a decree of distribution as to their distributive shares of the estate. The decree of distribution as to their shares was withheld due to their "... request for additional time to investigate the 'continued effectiveness' of the [Attorney General's] vesting order." (403 P. 2d at 406.) The Supreme Court of California noted that the decedent's will was not at all

ambiguous and that the record "*. . . is devoid, in fact, of any dispute over either the identity or the shares of the German legatees.*" (403 P. 2d at 407.) (Emphasis added.)

In contrast, in the instant case, on December 31, 1961—the cut-off date prescribed by the amendment to the Trading With The Enemy Act—the decedent's will was ambiguous and was the subject of a vigorously contested will construction suit (the *Orme* case) in which the identity of the legatees entitled to share in the trust assets was a matter of substantial dispute. It is therefore clear that the interests could not have vested in the possession of the Attorney General prior to the effective date of the amendment and should be returned to petitioners pursuant to the mandate of Congress contained in P.L. 87-846.

III.

THE LEGISLATIVE HISTORY OF P.L. 87-846 SUPPORTS PETITIONERS' POSITION

In 1962, the 87th Session of Congress of the United States had under consideration several amendments to the Trading With The Enemy Act (H.R. 7283). Those originating in the House of Representatives and which ultimately passed the House did not contain any provisions similar to the amendment here in question. (108 Cong. Rec. 15856).

In the Senate, however, Senator Bible introduced S.495 which provided for the immediate return of all property previously seized by the United States Government during the Second World War, to any of the former enemy alien owners who had since acquired United States citizenship. (107 Cong. Rec. 856).

Senators Bush and Saltonstall also introduced S. 291, which contained the following section 40(a) (107 Cong. Rec. 465):

> "Except as provided by subsection (b) there is hereby divested any unliquidated interest (including any increase thereof) in the estate of any decedent who at the time of his death was a citizen or national of the United States, or in any trust the corpus of which is composed of assets provided by any individual who at the time of the creation of such trust was a citizen or national of the United States, which has been vested under this Act after December 17, 1941, and has not been reduced to possession by any officer of the United States or department or agency thereof."

On September 15, 1961, the Senate Judiciary Committee recommended passage of S. 495 as amended by S. 291. (87th Congress, 1st Sess., Senate, Calendar No. 1043, Report No. 1062.)

The obvious purpose of this amendment was to rectify what Senator Dirkson during the debate on the amendment characterized as "an unhappy situation to say the least," that is, some 17 years after V-J Day, there were in the Department of Justice some 41 people working on alien property. (108 Cong. Rec. 22249; Senate, October 4, 1962.) Senator Long of Louisiana read from Charles Dickens' "Bleak House" in order to dramatize his argument that, like *Jarndyce* v. *Jarndyce,* the Trading With The Enemy Act program had gone on far too long. Senator Long made the point that the long years of litigation, with attendant attorneys' fees and costs, were gradually consuming the funds which had been available for distribution. (108 Cong. Rec. 19196-19197.)

On March 21, 1962, then Deputy Attorney General Byron S. White wrote to the Chairman of the Senate Judiciary Committee concerning S. 291 (108 Cong. Rec. 19228). This letter proposed a change in the wording of Section 40(a); the suggested language is almost verbatim that of Section 40(a) as finally enacted.* The letter expresses the Department of Justice's endorsement of the objectives of the bill.

> "The reasons for this conclusion are, first, that there must be a point at which vesting must stop, as it already has with respect to property acquired after December 31, 1946; and second, that, with the passing years, the expense of collecting income payments and preserving remainder interest will become disproportionately large in relation to the value of the property to be taken in."

The letter goes on to suggest a change in the language of the amendment so that all interests which have not become "payable or deliverable to or have not vested in possession in the Attorney General prior to the effective date of this amendment" are divested and to be returned to their former owners. The Justice Department objected to the original language of the amendment returning all interests which had "not been reduced to possession by any officer of the United States or any department or agency thereof." Because, in the words of the then Deputy Attorney General ". . . the effect of the bill would be to return such undistributed interests to former enemy nationals, . . ."

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* The only difference is that Deputy Attorney General White suggested the cut-off as "prior to the effective date of this amendment," while the Act as passed establishes a cut-off date "prior to December 31, 1961."

* * * "... S. 291 would returns interests due the Attorney General, but not yet collected, . . ." The Department of Justice in this letter expresses their interest in preserving for the Attorney General all interests which were at the cut-off date distributable or collectible by the Attorney General but not yet "reduced to possession."

This letter was placed on record in the Senate. (108 Cong. Rec. 19228.)

The language of Section 40(a) as suggested by Mr. White (with the single exception noted above) was presented to the Senate as an amendment to S. 495, and was passed without debate on September 12, 1962 (108 Cong. Rec. 19227-28.)

After a conference, the House of Representatives agreed to the amendment passed by the Senate (108 Cong. Rec. 21900) and subsequently the bill was signed into law by the President of the United States on October 22, 1962.

From this legislative history it is clear that the amendment as finally approved was intended to direct the return of all previously vested interests except those which had become undisputedly payable or deliverable to the Attorney General, or clearly vested in his possession, on the cut-off date.

The decision of the Illinois Appellate Court in this case substantially nullifies this clearly expressed Congressional purpose.

Conclusion

The decision of the Illinois Appellate Court frustrates the Congressional purpose to correct the serious injustice which was perpetrated upon persons such as these two old German ladies, whose property was confiscated in 1949, long after any justifiable reason for vesting had ceased to exist.

The property of petitioners should not have been vested in the first place. In light of the peculiar phrasing of the law which permitted vesting of "enemy" property at a time when the United States and Germany were close allies, this Court should liberally construe the 1962 amendment to the Trading With The Enemy Act to the end that petitioners' property may at long last be returned to them.

Respectfully submitted,

THOMAS P. SULLIVAN
HUGH M. KING
Attorneys for Petitioners
Adelheit von Hardenberg and
Irmgard von Alten

Of Counsel:
RAYMOND, MAYER, JENNER & BLOCK
135 S. La Salle Street
Chicago, Illinois 60603

ROLAND TOWLE
111 W. Washington Street
Chicago, Illinois

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